

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MALISSA L. MAESTAS,)	
)	No. CV-06-220-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 16, 17.) Attorney Clifford B'Hymer represents Plaintiff; Special Assistant United States Attorney David Blume represent Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment.

JURISDICTION

In June 2003, plaintiff Malissa Maestas (Plaintiff) filed for Supplemental Security Income benefits and Disability Insurance Benefits. (Tr. 52, 204.) She alleged disability due to stress,¹ a

¹ Although Plaintiff's initial disability report references an inability to work due to stress, (Tr. 63), the record does not

1 clavicle injury, shoulder and knee pain, with an onset date of April
2 19, 2003. (Tr. 52, 64, 84.) Benefits were denied initially and on
3 reconsideration. (Tr. 29-36.) Plaintiff requested a hearing before
4 an administrative law judge (ALJ), which was held before ALJ R. J.
5 Payne on September 29, 2005. (Tr. 224-78.) Plaintiff, who was
6 represented by counsel, testified. Medical expert Robert Berselli,
7 M.D., also testified. The ALJ denied benefits and the Appeals
8 Council denied review. (Tr. 7.) The instant matter is before this
9 court pursuant to 42 U.S.C. § 405(g).

10 **STATEMENT OF THE CASE**

11 The facts of the case are set forth in detail in the transcript
12 of proceedings, and are briefly summarized here. Plaintiff was born
13 March 21, 1957, and was 48 years old at the time of the hearing.
14 (Tr. 262-63.) She had a high-school equivalency degree. (Tr. 70.)
15 Her past work experience was as a certified nurse's aide and hotel
16 housekeeper. (Tr. 65.) She lived with her spouse, who was
17 disabled, and provided daily care for him. (Tr. 261.) She
18 testified she was unable to work due to her knee and shoulder
19 injury. (Tr. 243, 247.)

20 **ADMINISTRATIVE DECISION**

21 At step one, ALJ Payne found Plaintiff had not engaged in
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23 include medical evidence establishing a stress-related condition or
24 mental health treatment. Further, in her appeal of the ALJ's denial
25 of benefits, Plaintiff represents she became disabled due to
26 "multiple orthopaedic injuries, including that of the left knee,
27 right clavicle fracture and right should sebaceous cyst." (Ct. Rec.
28 16, Att. at 2.)

1 substantial gainful activity since her alleged onset date. (Tr.
2 21.) He found her history of nonunion clavicle fracture (left),
3 sebaceous cyst (right shoulder) and left knee meniscal tear were
4 severe impairments, but they did not meet or medically equal an
5 impairment listed in Appendix I, Subpart P, Regulations No. 4
6 (Listings). (Tr. 22.) He found Plaintiff's allegations of total
7 disability were not totally credible. At step four, he found
8 Plaintiff could perform work at a sedentary level, and was not
9 physically capable of performing her past relevant work, which was
10 medium level work. (Id.) He found Plaintiff's "capacity for
11 sedentary work is substantially intact and is not compromised by
12 nonexertional limitations." (Id.) Applying the Medical-Vocational
13 Guidelines at step five, he found Plaintiff could perform a
14 significant number of jobs in the economy. He concluded Plaintiff
15 had not been under a "disability," as defined by the Social Security
16 Act, through the date of his decision. (Id.)

17 STANDARD OF REVIEW

18 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
19 court set out the standard of review:

20 A district court's order upholding the Commissioner's
21 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
22 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
23 Commissioner may be reversed only if it is not supported
24 by substantial evidence or if it is based on legal error.
25 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
26 Substantial evidence is defined as being more than a mere
27 scintilla, but less than a preponderance. *Id.* at 1098.
28 Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

1 The ALJ is responsible for determining credibility,
2 resolving conflicts in medical testimony, and resolving
3 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
4 Cir. 1995). The ALJ's determinations of law are reviewed
5 *de novo*, although deference is owed to a reasonable
6 construction of the applicable statutes. *McNatt v. Apfel*,
7 201 F.3d 1084, 1087 (9th Cir. 2000).

8 SEQUENTIAL PROCESS

9 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
10 requirements necessary to establish disability:

11 Under the Social Security Act, individuals who are
12 "under a disability" are eligible to receive benefits. 42
13 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
14 medically determinable physical or mental impairment"
15 which prevents one from engaging "in any substantial
16 gainful activity" and is expected to result in death or
17 last "for a continuous period of not less than 12 months."
18 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
19 from "anatomical, physiological, or psychological
20 abnormalities which are demonstrable by medically
21 acceptable clinical and laboratory diagnostic techniques."
22 42 U.S.C. § 423(d)(3). The Act also provides that a
23 claimant will be eligible for benefits only if his
24 impairments "are of such severity that he is not only
25 unable to do his previous work but cannot, considering his
26 age, education and work experience, engage in any other
27 kind of substantial gainful work which exists in the
28 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is
disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
1999). This requires the presentation of "complete and
detailed objective medical reports of h[is] condition from
licensed medical professionals." *Id.* (citing 20 C.F.R. §§
404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner. *Tackett*, 180
2 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
3 Nevertheless, a decision supported by substantial evidence will
4 still be set aside if the proper legal standards were not applied in
5 weighing the evidence and making the decision. *Browner v. Secretary*
6 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
7 there is substantial evidence to support the administrative
8 findings, or if there is conflicting evidence that will support a
9 finding of either disability or non-disability, the finding of the
10 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
11 30 (9th Cir. 1987).

12 ISSUES

13 The question is whether the ALJ's decision is supported by
14 substantial evidence and free of legal error. Plaintiff argues the
15 ALJ erred when he (1) did not give adequate weight to her attending
16 physicians' opinions, and (2) improperly discounted her testimony.
17 (Ct. Rec. 16, Att. at 4.)

18 DISCUSSION

19 A. Credibility

20 In the absence of affirmative evidence of malingering, an ALJ
21 must provide specific and cogent reasons for rejecting a claimant's
22 subjective complaints. The ALJ's reasons must be "clear and
23 convincing." *Morgan*, 169 F.3d at 599. Here, there is no evidence
24 of malingering. Furthermore, "the ALJ must specifically identify
25 the testimony she or he finds not to be credible and must explain
26 what evidence undermines the testimony." *Holohan v. Massanari*, 246
27 F.3d 1195, 1208 (9th Cir. 2001) (citation omitted). The following
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1 factors may be considered: (1) the claimant's reputation for
2 truthfulness; (2) inconsistencies in the claimant's testimony or
3 between his testimony and his conduct; (3) claimant's daily living
4 activities; (4) claimant's work record; and (5) testimony from
5 physicians or third parties concerning the nature, severity, and
6 effect of claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947,
7 958 (9th Cir. 2002). An unexplained failure to seek treatment or
8 follow prescribed treatment may undermine a claimant's credibility.
9 *Rollins v. Massanari*, 261 F.3d 853 (9th Cir. 2001). If a claimant
10 produces objective medical evidence of an underlying impairment that
11 could reasonably cause pain, an adjudicator may not reject a
12 claimant's allegations based solely on a lack of objective medical
13 evidence to "fully corroborate the alleged severity." *Bunnell v.*
14 *Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991) (citation omitted). The
15 ALJ need not completely reject nor completely accept the claimant's
16 allegations. *Social Security Ruling (SSR)* 96-7p. When a claimant
17 can spend a substantial part of his day engaged in the performance
18 of physical activity which is transferable to a work setting, such
19 a finding is sufficient to discredit allegations of disability. See
20 *Morgan*, 169 F.3d at 599-600. However, the Social Security Act does
21 not require a claimant to be totally incapacitated to be eligible
22 for benefits. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

23 After summarizing the medical evidence, the ALJ found, despite
24 Plaintiff's allegations of total disability, she reported caring for
25 her invalid spouse, an ability to stand for "a couple of hours," to
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1 sit for two hours and lift a gallon of milk,² and household
2 activities of shopping, cooking, and doing laundry. (Tr. 19.) He
3 also found that although medical records from 2004 recommended
4 arthroscopic surgery, the treatment notes indicated limited follow-
5 up or treatment, and objective imaging evidence indicated normal
6 results. (Id.) Based on this evidence, he concluded Plaintiff's
7 allegations were not totally credible. (Tr. 19, 20.) These
8 findings are not sufficiently "clear and convincing" to discount
9 Plaintiff's credibility.

10 The Commissioner may not deny benefits if a claimant's
11 condition is remediable, but she cannot afford the necessary medical
12 treatment. *Gamble v. Chater*, 68 F.3d 319 (1995). To do so is
13 contrary to the purpose of the Social Security regulations and the
14 Commissioner's policies. SSR 82-59 (interpreting 20 C.F.R. §§
15 404.1530, 416.930). As explained by the Commissioner, failure to
16 follow prescribed treatment is justified if "the individual is
17 unable to afford prescribed treatment which he or she is willing to
18 accept, but for which free community resources are unavailable."
19 *Id.* The record clearly indicates that Plaintiff was waiting for
20 funding from Labor and Industries to proceed with her knee surgery.
21 (Tr. 146, 147, 153, 154, 276.) Plaintiff's inability to follow
22 through with recommended surgery due to financial constraints does
23 not undermine her credibility. Further, Plaintiff's allegations of
24 exertional limitations and pain are consistent with Dr. Buratto's
25 treatment notes and opinions, discussed below, that were improperly

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27 ² Depending of the type of milk, a gallon of milk weighs
28 between 8.5 and 8.8 pounds. See <http://www.onlineconversion.com>.

1 rejected by the ALJ. As for her activities of daily living, she
2 testified she had had, up until recently, 35 hours of in-home
3 assistance, someone drove her to her shopping, and the pace at which
4 she cared for her spouse was quite slow. (Tr. 268-69, 272-74.)
5 This testimony was not specifically rejected by the ALJ. It is not
6 clear from the record that Plaintiff's physical activities involved
7 in caring for her household and invalid spouse at her own pace,
8 occasionally on crutches and at home where she can periodically
9 rest, are transferable to the workplace. See *Fair*, 885 F.2d at 603.
10 The ALJ's credibility determination is not supported by substantial
11 evidence.

12 **B. Medical Opinions**

13 Plaintiff argues the ALJ did not give proper weight to the
14 opinions of her attending physician, Gregory Buratto, M.D., and her
15 orthopedic surgeon, Scott Hutson, M.D., when he found she could
16 perform sedentary work.³ Specifically, she argues that Dr. Burrato's
17 Medical Source Statement indicates she was precluded from carrying
18 or lifting more than two and one half pounds for a sustained period,
19 should only stand or walk for a total of forty-five minutes to one
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21 ³ Sedentary work requires an ability to sit for a total of six
22 hours of an eight-hour day and an ability to walk and stand a total
23 of two hours in an eight-hour day. It also involves lifting no more
24 than ten pounds at a time, and the occasional lifting or carrying
25 articles like docket files and small tools. Medium work requires
26 lifting 25 pounds frequently, and standing or walking off and on for
27 about six hours in an eight-hour day; sitting may occur
28 intermittently. SSR 83-10.

1 hour in an eight-hour day, and should only sit for two hours without
2 interruption. Dr. Buratto also opined she had moderate postural
3 limitations. (Tr. 161.) She argues these limitations render her
4 disabled, and the ALJ erred when he did not give clear and
5 convincing reasons for rejecting them. (Ct. Rec. 16, Att. at 4-6).
6 She also contends Dr. Hutson's recommendation that she have
7 arthroscopic surgery supports her claim that she is totally disabled
8 due to her knee problems. (Ct. Rec. 16, Att. at 6.)⁴

9 In a disability proceeding, it is the role of the ALJ to
10 resolve conflicts in medical evidence. A treating physician's
11 opinion is given special weight because of his familiarity with the
12 claimant and her physical condition. See *Fair*, 885 F.2d at 604-05.
13 If the treating physician's opinion is not contradicted, it can be
14 rejected only with "clear and convincing" reasons. *Lester v.*
15 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If contradicted, the ALJ
16 may reject the opinion if he states specific, legitimate reasons
17 that are supported by substantial evidence. See *Flaten v. Secretary*
18 *of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995); *Fair*,
19 885 F.2d at 605. Furthermore, a treating physician's opinion "on
20 the ultimate issue of disability" must itself be credited if
21 uncontroverted and supported by medically accepted diagnostic

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23 ⁴ Plaintiff mistakenly attributes notes by Dr. Buratto to Dr.
24 Hutson in her contention that Dr. Hutson reported she is "precluded
25 [from] bending, squatting, prolonged standing or walking because of
26 degenerative knee that needs to be replaced." (Ct. Rec. 16, Att. at
27 6.) Plaintiff's citation to the record references clinical notes
28 from Dr. Buratto. (Tr. 3 (Exhibit 7F), 151.)

1 techniques unless it is rejected with "clear and convincing"
2 reasons. *Holohan*, 246 F.3d at 1202-03.

3 To meet this burden, the ALJ can set out a detailed and
4 thorough summary of the facts and conflicting clinical evidence,
5 state his interpretation of the evidence, and make findings.
6 *Thomas*, 278 F.3d at 957; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
7 Cir. 1989). The ALJ is not required to accept the opinion of a
8 treating or examining physician if that opinion is brief, conclusory
9 and inadequately supported by clinical findings. *Id.*

10 Historically, the courts have recognized conflicting medical
11 evidence, the absence of regular medical treatment during the
12 alleged period of disability, and the lack of medical support for
13 doctors' reports based substantially on a claimant's subjective
14 complaints of pain, as specific, legitimate reasons for disregarding
15 the treating physician's opinion. See *Flaten*, 44 F.3d at 1463-64;
16 *Fair*, 885 F.2d at 604. Even where an ALJ does not specifically
17 state that he rejects a physician's opinions, it is proper for a
18 reviewing court to draw inferences from the ALJ's discussion of the
19 physician's findings and opinion, if inferences are there to be
20 drawn. *Magallanes*, 881 F.2d at 755.

21 Here, the ALJ summarized the medical evidence, including Dr.
22 Buratto's August 2005 medical assessment, noting that Dr. Buratto
23 opined Plaintiff could sit eight hours in an eight-hour day, at two
24 hour intervals; could stand or walk no more than 45 minutes to one
25 hour in an eight-hour day; and could lift no more than two and one
26 half pounds. (Tr. 19, 160-62.) Dr. Buratto's opinions regarding
27 Plaintiff's exertional limitations were contradicted by non-

1 examining agency physicians, (whose opinions are considered expert
2 medical opinions, 20 C.F.R. §§ 404.1527(f), 416.927(f)), and the
3 non-examining medical expert who testified at the hearing. (Tr.
4 231-42.) In March 2004, agency physician Charles Wolfe, M.D.,
5 reviewed the medical records and opined Plaintiff had the residual
6 functional capacity (RFC) to lift frequently 25 pounds and to stand
7 or walk for about six hours in an eight-hour day, and sit with
8 normal breaks for about six hours in an eight-hour day. (Tr. 138.)
9 Medical expert Robert Berselli, M.D., an orthopedic specialist,
10 reviewed the record in its entirety, and concurred with Dr. Wolfe's
11 findings, with the exception that Plaintiff had no restrictions in
12 her ability to sit.⁵ (Tr. 167-68.) Therefore, the ALJ must state
13 specific and legitimate reasons for rejecting Dr. Buratto's
14 contradicted opinions.

15 In discussing Dr. Buratto's opinions, the ALJ stated "[Dr.
16 Burrato] indicated that given her employment as a nurse's assistant
17 and housekeeper, she 'most likely would need retraining to return to
18 gainful employment once knee as been treated' which clearly does not
19 show an endorsement for 'disability.'" (Tr. 17.) However, the ALJ
20 did not give specific or legitimate reasons for rejecting Dr.
21 Buratto's opinion that she could not walk for more than one hour in
22 an eight-hour day until her knee was treated. Rather, the ALJ

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24 ⁵ Dr. Berselli testified Plaintiff could do medium work with
25 nonexertional limitations in kneeling, stooping, bending and
26 climbing stairs. (Tr. 232-33.) He opined the objective imaging in
27 medical records showed "fraying of the meniscus," which was not an
28 indication for knee surgery. (Tr. 236.)

1 found Dr. Buratto's "outlined residual functional capacity
2 assessment/specifically-noted limitations would be accommodated at
3 the sedentary level." (Tr. 19.) This is legal error, as sedentary
4 work requires an ability to lift up to 10 pounds and standing and
5 walking up to two hours in a workday. Dr. Buratto's unrejected
6 opinions regarding Plaintiff's exertional limitations are not
7 consistent with sedentary work. *Supra*, n.3. Further, as discussed
8 above, Plaintiff's inability to follow-up with recommended knee
9 surgery she could not afford does not preclude her from benefits if
10 she is otherwise disabled. It follows that Plaintiff's failure to
11 follow up with recommended surgery due to financial constraints is
12 not a legitimate reason to discount Dr. Buratto's residual
13 functional capacity assessment. *See Gamble*, 68 F.3d at 321; SSR 82-
14 59.

15 Dr. Buratto also opined in 2005 that Plaintiff could not lift
16 more than 2.5 pounds occasionally for two to three hours, explaining
17 that deterioration of cartilage "precludes her lifting and carrying
18 any significant amount or sustained activity." (Tr. 160-61.) The
19 ALJ did not give specific or legitimate reasons for rejecting this
20 exertional limitation. Although Plaintiff testified she could hold
21 a gallon of milk with two hands, she stated she could not always
22 lift it or carry it when she was using her crutches. (Tr. 250,
23 269.) This testimony is not inconsistent with Dr. Buratto's opinion
24 that she was limited in her ability to lift and carry more than 2.5
25 pounds for a sustained time. Having failed to specifically reject
26 these significant exertional limitations, the ALJ's RFC
27 determination that Plaintiff's capacity for sedentary work was
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1 substantially intact is unsupported by substantial evidence. SSR
2 83-10. Because the ALJ's RFC findings did not reflect accurately
3 Plaintiff's functional capacity, his use of the Medical-Vocational
4 Guidelines at step five is legal error requiring remand.

5 **C. Step Five - Use of the Medical-vocational Guidelines**

6 At step five, the burden shifts to the Commissioner to show
7 that (1) the claimant can perform other substantial gainful
8 activity; and (2) a "significant number of jobs exist in the
9 national economy" which claimant can perform. *Kail v. Heckler*, 722
10 F.2d 1496, 1498 (9th Cir. 1984). The Medical-Vocational Guidelines
11 (Grids) is a matrix system developed by the Commissioner for
12 resolving cases that involve substantially uniform functional
13 capacities. *Desrosiers v. Secretary of Health and Human Services*,
14 846 F.2d 573, 578 (9th cir. 1988). The Grids were adopted to improve
15 the efficiency of disability benefits proceedings. *Id.* Their use
16 was upheld as valid in *Heckler v. Campbell*, 461 U.S. 458 (1983).
17 However, the Grids are an administrative tool, and there are strict
18 limits on when the Commissioner may rely on them; the exclusive use
19 of the Grids is appropriate only where "a claimant's functional
20 limitations fall into a standardized pattern accurately and
21 completely described by the Grids." *Tackett*, 180 F.3d at 1103
22 (citing *Desrosiers*, 846 F.2d at 577). Where the Grids do not
23 accurately describe a claimant's condition, the Grids are used as a
24 "framework for decision-making," and vocational expert testimony is
25 required to determine if there are jobs in that national economy
26 that the individual claimant can perform. See *Polny v. Bowen*, 864
27 F.2d 661, 663-64 (9th Cir. 1988); SSR 83-12. Where the Grids are not

1 determinative, the Commissioner has the burden of showing specific
2 jobs within the claimant's capabilities. See *Kail*, 722 F.2d at
3 1498. When a claimant cannot perform a full range of sedentary
4 work, her particular limitations, including pain, and their impact
5 on the full range of sedentary work must be evaluated individually.
6 SSR 83-12.

7 Here, at step five, the ALJ took "administrative notice" of
8 historical "expert vocational analysis." (Tr. 21.) Vocational
9 expert testimony is not a proper subject to be administratively or
10 judicially noticed, is inadequate to satisfy a step five requirement
11 for vocational expert testimony and is contrary to the
12 Commissioner's policy. SSR 83-10; SSR 83-12. The ALJ's failure to
13 call a vocational expert is reversible error.

14 **D. Remedy**

15 There are two remedies where the ALJ fails to provide adequate
16 reasons for rejecting the opinion of treating or examining
17 physicians. The general rule, found in the *Lester* line of cases, is
18 that "we credit that opinion as a matter of law." *Benecke v.*
19 *Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004); *Lester*, 81 F.3d at 834;
20 *Smolen v. Chater*, 80 F.3d 1273, 1291-92 (9th Cir. 1996); *Pitzer*, 908
21 F.2d at 506; *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir. 1989).
22 Under the alternate approach found in *McAllister v. Sullivan*, 888
23 F.2d 599 (9th Cir. 1989), a court may remand to allow the ALJ to
24 provide the requisite specific and legitimate reasons for
25 disregarding the opinion. See also *Salvador v. Sullivan*, 917 F.2d
26 13, 15 (9th Cir. 1990) (citing *McAllister*). The *McAllister* approach
27 appears to be disfavored where the ALJ fails to provide any reasons
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1 for discrediting a medical opinion. See *Pitzer, supra*; *Winans v.*
2 *Bowen*, 853 F.2d 643 (9th Cir. 1988).

3 Case law requires an immediate award of benefits when: (1) the
4 ALJ has failed to provide legally sufficient reasons for rejecting
5 [a medical opinion], (2) there are no outstanding issues that must
6 be resolved before a determination of disability can be made, and
7 (3) it is clear from the record that the ALJ would be required to
8 find the claimant disabled were such evidence credited. *Harman*, 211
9 F.3d at 1178; *Smolen*, 80 F.3d at 1292.

10 Here, it is not clear that Plaintiff's limitations, as opined
11 by Dr. Buratto, would require a finding of disability. Vocational
12 expert testimony is required to evaluate Plaintiff's exertional and
13 non-exertional limitations and their impact on her ability to work.
14 On remand, the ALJ will conduct a new sequential evaluation, make
15 new credibility findings, and give legally sufficient reasons for
16 the rejection of medical and other source opinions. At step five,
17 vocational expert testimony will be taken to evaluate Plaintiff's
18 individual limitations and her ability to perform other work in the
19 national economy. Accordingly,

20 **IT IS ORDERED:**

21 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 16**) is
22 **GRANTED;**

23 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
24 **DENIED;**

25 3. Application for attorney fees may be filed by separate
26 motion.

27 The District Court Executive is directed to file this Order and
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1 provide a copy to counsel for Plaintiff and Defendant. Judgment
2 shall be entered for **PLAINTIFF**, and the file shall be **CLOSED**.

3 DATED May 16, 2007.

4 S/ CYNTHIA IMBROGNO

5 UNITED STATES MAGISTRATE JUDGE
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